LE COPY

MAR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 555

THE NEZ PERCE TRIBE OF INDIANS AND WILLIAM N. STEVENS, *Petitioners*,

v.

FRED A. SEATON, Secretary of the Interior, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

IRA GABLE SCHLEIER
EUGENE GRESSMAN
1700 K Street, N. W.
Washington 6, D. C.
Counsel for Petitioners

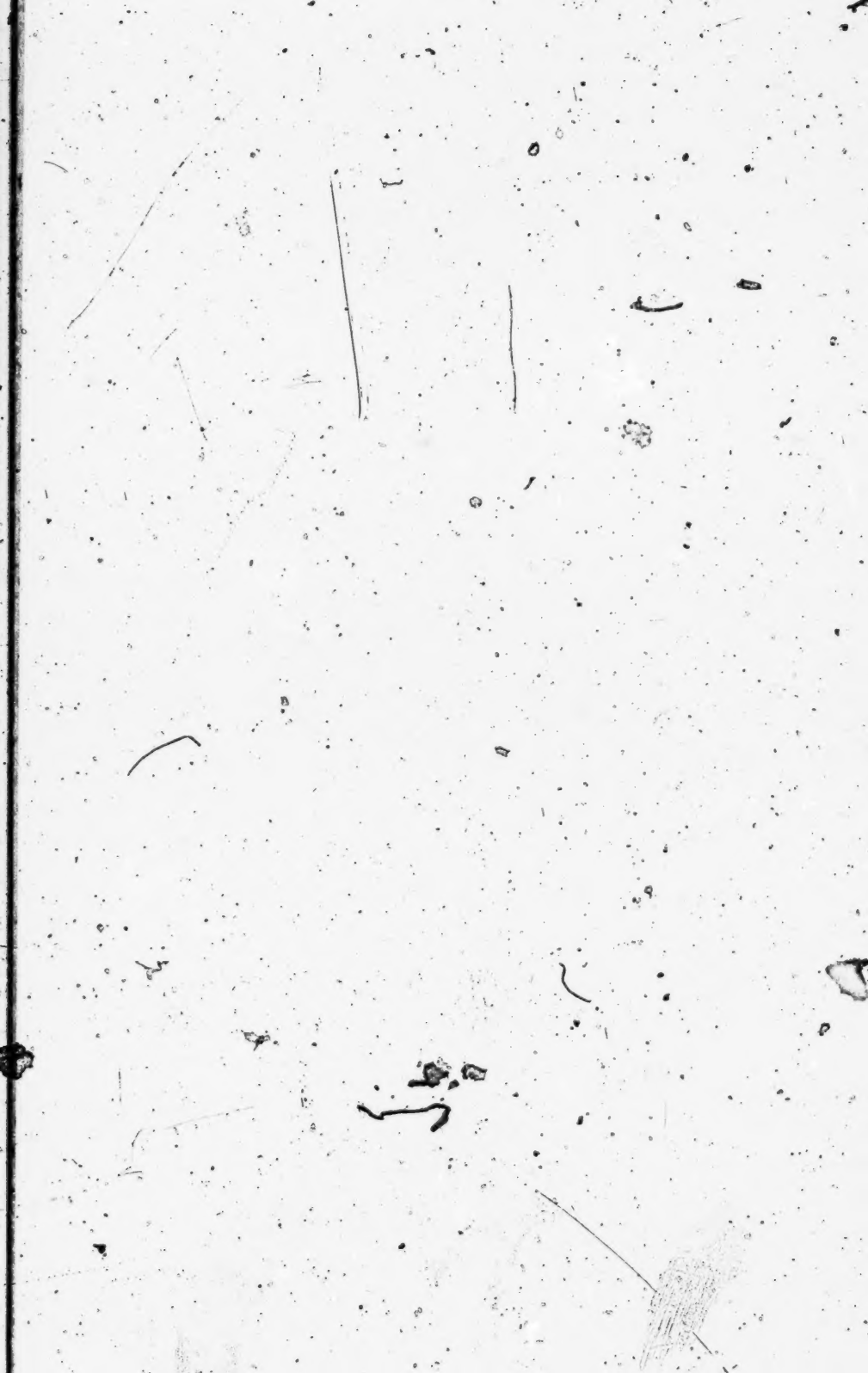
PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX TO REPLY BRIEF

	Page
I. Respondent's Belated Willingness to Submit This Case to Judicial Review Does Not Remove the Need for Injunctive Relief	1
II. Respondent Misinformed the Court as to the Merits of This Controversy	7
III. Indian Trust Land Is Entitled to as Much If Not More Protection Than Other Private Land	8
IV. A Judgment for Petitioners Would Not Require an Affirmative Directive to Respondent	9
Conclusion	10
Appendix	11

CITATIONS

Barta, et al. v. Oglala Sioux Tribe, No. 548, this term, certiorari denied January 12, 1959	9
Chippewa Indians v. United States, 301 U.S. 358 (1937)	8
Goldberg v. Daniels, 231 U.S. 218 (1913)	9
Ickes v. Fox, 300 U.S. 82 (1937)	8
Jaybird Mining Co. v. Weir, 271 U.S. 609, 612 (1926)	8
Land v. Dollar, 330 U.S. 731, 738 (1947)	3, 8
Minnesota v. Hitchcock, 185 U.S. 373, 387 (1902)	9
Philadelphia Co. v. Stimson, 223 U.S. 605 (1912)	8
Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498 (1911)	6
Taylor v. McElroy, No. 504, Oct. Term 1958	2, 6
United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1938)	8
United States v. Lee, 106 U.S. 196 (1882)	8
United States v. W. T. Grant Co., 345 U.S. 629 (1953)	6
Walling v. Helmerich & Payne, 323 U.S. 37 (1944)	6
West Coast Expl. Co. v. McKay, 213 F. 2d 582 (1954)	9
Cohen, Handbook of Federal Indian Law (1942 ed.), p. 309	8



IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 555

THE NEZ PERCE TRIBE OF INDIANS AND WILLIAM N. STEVENS, *Petitioners,*

v.

FRED A. SEATON, Secretary of the Interior, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF

I. Respondent's Belated Willingness to Submit This Case to Judicial Review Does Not Remove the Need for Injunctive Relief

Respondent, apparently fearful of the consequences of a grant of certiorari, has made another last-minute "administrative determination" in a frantic effort to

drain this case of live controversy. See *Taylor* v. *McElroy*, No. 504, Oct. Term 1958, now pending before this Court.

The respondent has advised this Court that the Department of the Interior, after having "discussed this entire matter with the Office of the Solicitor General," is prepared to institute suit to quiet title to the land. Or, says the respondent, petitioners could bring suit in the Court of Claims to resolve the merits of the dispute. This "administrative determination" comes almost three months after the petition herein was filed and one week before respondent's answer thereto was due. And it comes nearly nine months after the Court of Appeals characterized the question on the merits as "highly debatable"—the characterization which is now said to have led to this "administrative determination." It comes more than three years after petitioners' request for a five-day delay in the conveyance of the controverted land was rejected, forcing petitioners to bring suit within twenty-four hours following the administrative action and requiring them to obtain a Temporary Restraining Order to prevent respondent from carrying out his illegal scheme.

The suggested alternative courses of judicial action, of course, have been in existence and known to the respondent long before the formulation of this belated "administrative determination." Nothing has intervened between the rendition of the decision of the Court of Appeals below and this Court's consideration of the petition for certiorari except respondent's concern over the possibility of a reversal of the decision below.

The truth of the matter is, of course, that neither of the suggested lawsuits deprives the jurisdictional

problem of importance for purposes of certiorari. The Court expressly held in *Land* v. *Dollar*, 330 U.S. 731, 738 (1947), that where a public official unlawfully holds or claims title to a citizen's realty or chattels, "recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment." Nor have any of the cases in this Court involving disputed title to land suggested that the possibility of a quiet title suit makes it unnecessary to resolve an appropriately raised issue of sovereign immunity in an injunction proceeding. The thrust of the instant action is to restrain the respondent from threatened violation of his statutory duty toward the petitioners, an issue of obvious public importance in the administration of the laws of the United States. That the issue might be resolved in the context of another kind of proceeding does not make it inappropriate to resolve it in the forum where it is first raised.[1]

This sudden concern of the respondent "that the issue on the merits should be promptly laid to rest, before the proposed conveyance to the Lapwai School District is completed" is in sharp contrast to the precipitous action of the respondent which led to the institution of this action in 1955. Then the respondent, although informed of petitioners' determination to obtain judicial review, attempted to moot the case

[1] Indeed, the suggestion of respondent that the merits of the title dispute might be resolved in a quiet title suit in the District Court for Idaho suffers materially from the fact that none of the evidence pertinent to that issue is available in Idaho. The evidence, consisting largely of materials in the National Archives, plus matters of public record, are in Washington, D. C., and are readily available to the District Court for the District of Columbia, where the instant suit originated.

by executing and mailing the conveyance three and a half hours after petitioners had been informed of the rejection of their administrative appeal. As dramatically illustrated by the correspondence and affidavit on file in the original record of this case, and reprinted in the Appendix hereto, petitioners' request for a short delay in the consummation of the transaction to give them "time to consider and institute appropriate legal proceedings for a determination of their interests in the property" was summarily rejected. Only a temporary restraining order, issued at an emergency Saturday session of the District Court, prevented the irretrievable loss of the land so as to make possible any sort of judicial determination of petitioners' rights in this "highly debatable" matter.

The vital need for the injunctive remedy appears most clearly from the following time-table of events:

June 1, 1955—Solicitor of Interior Department rules that Tribe has no interest in tract in controversy;

June 6, 1955—Counsel for Nez Perce Tribe informs Bureau of Indian Affairs of Tribe's intention to submit case to judicial review, requests that no action be taken with regard to the title of the land "until we have obtained a court decision in this matter";

June 8, 1955—Counsel for Nez Perce Tribe requests Solicitor to reconsider administrative determination and to grant opportunity for oral argument;

December 15, 1955 (Thursday)

11:30 a.m.—Counsel for Nez Perce Tribe receives letter from Deputy Solicitor (1) affirming previous administrative determination, (2) rejecting request for oral argument,

(3) advising that "we shall recommend final action on the transfer without further delay";

2-3 p.m.—Counsel for Nez Perce Tribe tries to telephone Assistant Commissioner of Indian Affairs and is informed that he is busy;

3 p.m.—Conveyance of land to Lapwai School District is signed and mailed to Indian Bureau Area Director at Portland for delivery to school officials;

5:30 p.m.—Assistant Commissioner of Indian Affairs returns telephone call of counsel for Nez Perce Tribe, informs counsel of what had transpired at 3 p.m., rejects requests for 30-day postponement of delivery, rejects request for 5-day postponement of delivery, both requests being made for purpose of allowing counsel to prepare suit;

December 16, 1955 (Friday)

Nez Perce Tribe files injunction suit and Motion for Temporary Restraining Order;

December 17, 1955 (Saturday)

District Court issues Temporary Restraining Order preventing delivery of conveyance; counsel for Nez Perce Tribe telegraphs Portland Area Director: "Restraining order signed by Judge Youngdahl today prohibits your delivery of Nez Perce Agency Lands deed."

Thus only through prompt invocation of injunctive relief was the loss of the land prevented in 1955. To suggest that now, after the petitioners have spent nearly three years in an effort to resolve the merits of the issue, the merits can be "promptly laid to rest" by starting all over again in some other tribunal is to propose an unwarranted judicial trap for all those

who seek injunctive relief against public officials about to violate their statutory duties. If injunctive relief was necessary in 1955 and if the jurisdictional defense interposed by the respondent was important in 1955, that relief is just as necessary in 1959 and the validity of that defense is just as important in 1959. The respondent does not and cannot suggest that this injunctive proceeding is moot. Respondent has in no way retreated from his claim to full title to the land and he still proposes to convey the land to the Lapwai School District. All that has happened here is a temporary postponement of the imminence of the challenged conveyance. But the temporary discontinuance of the challenged activity upon which a suit is initially predicated does not deprive this Court of the power to adjudicate the dispute. *Walling* v. *Helmerich & Payne*, 323 U.S. 37 (1944); *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498 (1911) Nor does it make a grant of certiorari any less appropriate where, as here, problems of great importance are involved.

This case, in short, must be viewed in the perspective of a last-ditch effort by respondent to avoid the feared consequences of a grant of certiorari: Cf. *Taylor* v. *McElroy*, No. 504, Oct. Term 1958, now pending before this Court. So viewed, the jurisdictional problem presented by the petition assumes even greater public importance than might otherwise be attached to it. The action of the respondent can only be interpreted as an implicit concession that the decision below was probably wrong and that petitioners were entitled to a decision on the merits in the District Court for the District of Columbia.

II. Respondent Misinformed the Court as to the Merits of This Controversy

Respondent's brief states that "[b]y the Agreement of 1893 . . . the Nez Perce Indians relinquished all claims and ceded to the United States all interests in a defined tract of land which, as described, includes the lands involved in this suit." (p. 8). It states further that petitioners' claim was that the disputed lands were exempted by implication (pp. 6, 8).

Respondent has misinformed the Court on both counts, although surely inadvertently.[2] Petitioner Tribe, as a mere reading of Article I of the Agreement of 1893 reveals, most certainly did not cede "a defined tract of land." It ceded *the unallotted lands* within a defined tract. And petitioners do not contend that the disputed lands were exempted *by implication*. Petitioners' contention is that the term *unallotted lands* did not cover the lands allotted for school, agency, or graveyard purposes, and that these lands were thus explicitly excluded from the cession. The dispute in this case revolves around the scope of the area included in the term *unallotted lands*.

It is respectfully submitted that respondent's bare assertion, without proof, that the lands here in controversy were unallotted lands and were thus ceded does not make its claim so substantial a one as to warrant summary disposition on the pleadings on the basis of a sovereign immunity defense. If it did, any mere assertion contained in the pleadings could be said to advance a substantial claim. Surely, the doctrine of

[2] Respondent's errors point up the folly of trying to determine the jurisdictional issue after fleeting glimpses at, rather than full consideration of, the merits.

sovereign immunity should not turn on the ingenuity exercised by counsel for the defendant Government official in framing the pleadings.

III. Indian Trust Land Is Entitled to as Much if Not More Protection Than Other Private Land

As the petition points out, the decision below is in direct conflict with *Land* v. *Dollar*, 330 U.S. 731 (1947), *Ickes* v. *Fox*, 300 U.S. 82 (1937), *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912) and *United States* v. *Lee*, 106 U.S. 196 (1882). Respondent seeks to avert the impact of these decisions by arguing that the benefits accorded private property by those decisions is not enjoyed by Indian trust property.

Respondent's argument on this aspect of the case was anticipated in the Petition, pp. 8-9. At this point it need merely be added that respondent has been unable to distinguish between form and substance in speaking of the "admitted interest" of the United States in Indian trust land. The United States has an admitted interest in the land, but it is an interest to be asserted for the purpose of *protecting* rather than undermining the Indian interest. See *Jaybird Mining Co.* v. *Weir*, 271 U.S. 609, 612 (1926).[3]

Indian trust land is most assuredly private property, fully protected by Constitutional guarantees. See *Chippewa Indians* v. *United States*, 301 U.S. 358 (1937), *United States* v. *Klamath and Moadoc Tribes*, 304 U.S. 119 (1938). The relationship to the United

[3] As was said in Cohen, *Handbook of Federal Indian Law* (1942 ed.), p. 309: "Tribal possessory right in tribal land requires protection not only against private parties but against administrative officers acting without legal authority and against persons purporting to act with the permission of such officers."

States implicit in the concept of the United States holding the land in trust for the Indians adds certain special protective rights rather than detracting from the rights of the Indians. See *Minnesota* v. *Hitchcock*, 185 U.S. 373, 387 (1902). To suggest that the assumption of trust responsibility removes the trustee from accountability and permits him to deal with the beneficiary's land as if it were his own, means turning all applicable legal standards upside down. The apparent misconceptions of the Government official directly charged with carrying out the Government's trusteeship responsibilities as to the nature of these responsibilities is an added reason for the grant of this petition.[4]

IV. A Judgment for Petitioners Would Not Require an Affirmative Directive to Respondent

As discussed in the Petition, pp. 10-11, injunctive relief is all that petitioners seek. This is not a case in which petitioners seek specific performance of a contract or other legal obligation, through conveyance to them of "unquestionably sovereign property."[5] Cf. *Goldberg* v. *Daniels*, 231 U.S. 218 (1913). An injunction prohibiting respondent to deal with the land as if it were public land is all that is required. No "transfer" to petitioner Tribe would be needed.

---

[4] Respondent's reference to *Barta, et al.* v. *Oglala Sioux Tribe*, No. 548, this Term, certiorari denied, January 12, 1959 is illustrative of his confusion. In the *Barta* case the United States exercised its trustee function to help protect Tribal land. Its action in that case is surely no authority for defeating Tribal rights in this case.

[5] Significantly, the Court below was prepared to go that far in *West Coast Expl. Co.* v. *McKay*, 213 F. 2d 582 (1954), thus adding to the total confusion of the law in this area.

Respondent is thus clearly mistaken when it suggests that petitioners are seeking the issuance of an "affirmative directive." By thus failing to show an understanding of the relevant concepts in this area of law, respondent has underlined the need for a definitive pronouncement by this Court which can come only through a grant of the Petition.

CONCLUSION

For the reasons set forth herein as well as in the Petition, petitioners pray that a writ of certiorari issue to review the judgment rendered by the Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

RICHARD SCHIFTER
EUGENE GRESSMAN
1700 K Street, N. W.
Washington 6, D. C.
Counsel for Petitioners

March 13, 1959

APPENDIX

The following letters and affidavit were filed on December 16, 1955, in the District Court in support of the Motion for a Temporary Restraining Order:

June 6, 1955

Mr. W. Barton Greenwood
Assistant Commissioner
Bureau of Indian Affairs
Department of the Interior
Washington 25, D. C.

Dear Mr. Greenwood:

The purpose of this letter is to confirm our conversation earlier today concerning the Nez Perce Agency Reserve. By letter of May 16, 1954 you advised me of the intent of the Bureau of Indian Affairs to transfer a certain portion of these lands to the Lapwai School District. You suggested at that time that if I have any evidence as to the Nez Perce Tribe's interest in the land I submit it to you. I did so by letter of June 16, 1954.

I am now in receipt of a communication from Solicitor Armstrong, forwarding a copy of a memorandum to the Commissioner of Indian Affairs, in which the opinion is expressed that the Nez Perce Tribe does not have an interest in the land in question. As I indicated to you in our telephone conversation, I would consider it in the interest of all concerned if a judicial determination of this issue were obtained. I am now preparing the necessary complaint and request most respectfully that you do not take any action with regard to the title of the land until we have obtained a court decision in this matter.

Sincerely yours,

/s/ Richard Schifter
Richard Schifter

June 8, 1955

Mr. J. Reuell Armstrong
Solicitor
Department of the Interior
Washington 25, D. C.

Dear Mr. Armstrong:

I refer to your letter of June 1, 1955 and the memorandum attached thereto concerning the status of the Nez Perce Agency Reserve. I believe the conclusion reached in the memorandum is clearly erroneous. By letter of June 6, 1955, I consequently advised Commissioner Greenwood that the matter at issue will now have to be tested in the courts.

Although the exhaustion of administrative remedies does not appear to be a necessary prerequisite to a judicial proceeding in this case, I respectfully request that the question of the ownership of the Reserve lands be reconsidered by you and that I be allowed to argue the matter orally before you. If the final decision should be adverse to the Nez Perce Tribe, I also request that it be approved by the Secretary.

By following the above course, we can be certain of removing future procedural obstacles to litigation. At the same time we would provide a further opportunity for resolving this question without causing the Government and the Tribe the expense of litigation.

Sincerely yours,

/s/ Richard Schifter
Richard Schifter

cc: Mr. W. Barton Greenwood

December 9, 1955

Richard Schifter, Esquire
Strasser, Spiegelberg, Fried & Frank
810 Eighteenth Street, Northwest
Washington 6, D. C.

Dear Mr. Schifter:

Your letter of October 10, 1955, and supplementary memorandum in the matter of the Lapwai Reserve, Northern Idaho Agency, has been carefully considered. We do not find such new points or arguments as would cause us to revise our earlier opinion that the title to the lands involved in the proposed transfer to Lapwai School District 341 is solely in the United States, and as the matter has been extensively covered in your memorandum, it does not appear that oral argument would serve any good purpose.

We shall continue to maintain that these lands were ceded to the United States and were not included in the areas specifically reserved for Indians by the Agreement of 1893. The conveyance, therefore, may be made without the Tribe's consent.

Since it appears to be to the best interests of all the parties, we shall recommend final action on the transfer without further delay.

Sincerely yours,
/s/ EDMUND T. FRITZ
Deputy Solicitor.

DISTRICT OF COLUMBIA, SS.:

Affidavit

ARTHUR LAZARUS, JR., being duly sworn, deposes and says:

I am an attorney in the law firm of Strasser, Spiegelberg, Fried & Frank, 1700 K Street, N. W., Washington 6, D. C., which serves as counsel for the Nez Perce Tribe of Indians pursuant to a written contract duly approved by the Commissioner of Indian Affairs and assigned Symbol 14-20-650, Contract No. 122. I am a member of the Bars of the State of New York, the District of Columbia, the Court of Appeals for the District of Columbia Circuit, and the Supreme Court of the United States.

On or about October 15, 1955, I caused to be mailed to the Commissioner of Indian Affairs an announcement reporting the change of address of Strasser, Spiegelberg, Fried & Frank from 810 18th Street, N. W., Washington 6, D. C., to 1700 K Street, N. W., Washington 6, D. C., effective as of October 15, 1955. Thereafter, our records show that I and other employees of the firm received letters from various officers of the Interior Department and the Bureau of Indian Affairs addressed to 1700 K Street, N. W., Washington 6, D. C.

On December 15, 1955, at approximately 11:30 a.m., the firm received a letter signed by Edmund T. Fritz, Deputy Solicitor, Department of the Interior, and sent to Richard Schifter, an attorney in the firm, a certified copy of which is attached hereto as Exhibit 1. This letter, although dated December 9, 1955, was postmarked at 8:00 p.m. on December 14, 1955, and was addressed to 810 18th Street, N. W., Washington 6, D. C.

The aforementioned letter expresses the Department's opinion that title to certain lands in Idaho claimed by the

Nez Perce Indians and proposed to be transferred to Lapwai School District 341 "is solely in the United States." The letter further states that the conveyance "may be made without the tribe's consent" and "we shall recommend final action on the transfer without further delay."

At the request of Mr. Schifter, then in New Haven, Connecticut, on December 15, 1955, at approximately 2:00 p.m., I called W. Barton Greenwood, Assistant Commissioner of Indian Affairs, Department of the Interior, and the administrative officer with whom Mr. Schifter had been dealing, to request that the transfer of title to the land be postponed for thirty days to give the Indians time to consider and prepare for a judicial determination of their rights. I was advised by his secretary that Mr. Greenwood was busy on another phone and, consequently, left a message for him to return my call, stating that the matter was urgent. At approximately 3:00 p.m., not having heard from Mr. Greenwood, I placed another call to his officer but was informed that he was in conference.

At approximately 5:30 p.m. on December 15, Mr. Greenwood returned my call. I then advised him of our receipt of the letter of December 9 only six hours earlier, and requested that title to the lands not be transferred to the School District for 30 days so that the Indians could consider and institute appropriate legal proceedings for a determination of their interests in the property prior to its conveyance to a third party to their prejudice. Mr. Greenwood informed me that he could not grant this request since the deed to the land had been signed by the Commissioner of Indian Affairs at about 3:00 p.m. on December 15, and already had been sent by air mail to the Area Director, Bureau of Indian Affairs, at Portland, Oregon, for delivery to the School District. Mr. Greenwood further indicated that he would not attempt to postpone delivery of the deed even if such action were physic-

ally possible and even if the postponement sought were reduced from 30 to 5 days.

/s/ ARTHUR LAZARUS, JR.
Arthur Lazarus, Jr.

The following telegram was sent by counsel for petitioners on December 17, 1955:

"Donald Foster
Area Director
Bureau of Indian Affairs
Portland, Oregon

"Restraining order signed by Judge Youngdahl today prohibits your delivery of Nez Perce agency lands deed. Service will be effected Monday.

RICHARD SCHIFTER."